

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1817

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On October 10, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision claimant voluntarily left work without good cause (decision # 104504). Claimant filed a timely request for hearing. On November 10, 2014, ALJ Triana conducted a hearing at which the employer did not appear and issued Hearing Decision 14-UI-28476, affirming the Department's decision. On November 20, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Rite Aid and its predecessor entity, Payless Drug Stores, employed claimant in various capacities from October 29, 1973 to November 19, 2014, a total of over 41 years. Claimant last worked for the employer as a cashier. Working for the employer was the only job that claimant ever had.

(2) Sometime before 2007, claimant was diagnosed with depression and anxiety and received treatment from a counselor. In 2007, the counselor evaluated claimant and concluded that her mental health conditions were significantly affected by her perceptions of her job. Exhibit 1 at 1. The counselor observed that claimant cared very much about her job. The counselor noted that when claimant was corrected at work, she thought she had "done something terribly wrong and will lose her job" and that this "fear of being fired so overwhelms her that she then dysfunctions." *Id.* The counselor also stated her professional opinion that "[a]s an older person who [has] worked for this corporation for more than 30 years, [claimant] struggles with [the] many changes and personalities" that had occurred in the workplace. *Id.* at 2.

(3) In 2014, claimant was 65 years old. On March 5, 2014, March 26, 2014 and April 12, 2014, the store manager issued verbal and written warnings to claimant. These warnings were for various minor inefficiencies in claimant's work performance, such as failing to greet customers when she was waiting

on other customers, not returning fast enough to the cash register, not performing other job functions quickly and making mistakes. Exhibit 1 at 3-7. When the manager gave her the March 26, 2014 warning, claimant told the manager that she could not work as quickly as she once had because she was "not 50 anymore." Exhibit 1 at 7. At the time when the store manager gave claimant these warnings, he told claimant that the employer's district manager and chief executive officer (CEO) were not happy with her work performance and wanted her to quit.

(4) After April 12, 2014, claimant tried very hard to change her work performance to comply with the store manager's stated expectations. She was not able to do so to his satisfaction, and the manager began to take notes about aspects of claimant's performance that claimant needed to improve. Between April 2014 and mid-October 2014, the store manager spoke to claimant multiple times about deficiencies that he perceived in her work. Audio at ~ 24:43, ~26:68. On most, if not all of these occasions, the store manager stated to claimant that the district manager did not think claimant's work was adequate, that the district manager did not think claimant was able to improve her performance, and that the district manager wanted him to discharge claimant if she was not willing to leave work. Audio at ~10:07, ~12:00, ~12:38, ~23:59. On these occasions, the store manager asked claimant "would I quit or does he need to terminate me?" or stated that he was "trying to let [you] quit, give your two weeks' notice, versus [me] having to fire you." Audio at ~24:43, ~25:26. As a result of these continued corrections and the store manager's statements, claimant thought that the employer did not want her to remain at work any longer and was pressuring her to quit before she was discharged.

(5) In approximately late-October 2014, the store manager told claimant that she needed to resign or he was going to have to follow the district manager's instructions and discharge her. Claimant asked him, "Are you really going to do that?" and the store manager said, "I have to Dianne. I've been requested though my boss to do that." Audio at ~28:06. Claimant asked him if he had any alternative and whether he was willing to allow her to continue working part-time. Audio at ~20:07~22:30, ~30:30. The store manager told claimant, "No. This [the decision to discharge claimant] comes from his boss and he has to do what they want." Audio at ~ 30:30.

(6) Approximately one week later, sometime in early November 2014, the store manager again spoke to claimant about whether she intended to quit work or whether she was going to require him to discharge her. At that time, the store manager told claimant that if she did not resign he was going to discharge her "as soon as he wrote up the paperwork," "within a day or two" or by the end of the "first week in November." Audio at ~31:07, ~32:57. Claimant thought that the pressure on the store manager to remove her from the workplace had escalated and she could no longer avoid being discharged if she did not resign. A few days later, on approximately November 5, 2014, claimant gave the employer notice that she was going to quit work effective November 19, 2014. On November 19, 2014, claimant voluntarily left work.

**CONCLUSIONS AND REASONS:** Claimant voluntarily left work with good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she proves, by a preponderance of the evidence, that she had good cause for leaving work when she did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause" is defined, in relevant part, as a reason of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to leave work.

OAR 471-030-0038(4) (August 3, 2011). It is not good cause for a claimant to leave work to avoid what would otherwise be a discharge for misconduct or a potential discharge for misconduct. OAR 471-030-0038(5)(b)(F). The standard for determining whether good cause exists is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 722 (2010). There is reliable, un rebutted evidence in this record that claimant had depression and anxiety, which are permanent or long-term "physical or mental impairments" as defined at 29 CFR §1630.2(h). A claimant with those impairments who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairments would have continued to work for her employer for an additional period of time.

In Hearing Decision 14-UI-28436, the ALJ concluded that claimant was barred from showing good cause for leaving work under OAR 471-030-0038(5)(b)(F). The ALJ reasoned that this regulation applied to disqualify claimant from benefits because, having left work after receiving inadequate work performance warnings, the discharge that claimant sought to avoid "potentially may have been a discharge for misconduct." Hearing Decision 14-UI-28436 at 3. We disagree.

OAR 471-030-0038(5)(b)(F) states that it is not good cause to resign to avoid a "potential discharge for misconduct." As a matter of construction, the "potential" circumstance that is referred to in the language of that regulation is a "potential discharge" and not a discharge for "potential misconduct." EAB has consistently construed the regulation in this manner. EAB has held that actual and not "potential" misconduct must be shown to operate to preclude a claimant from benefits under OAR 471-030-0038(5)(b)(F). See *Joseph C. Thomas* (Employment Appeals Board, 2014-EAB-0549, April 30, 2014) (error for ALJ to conclude that a claimant who left work to avoid a discharge for "potential misconduct," was disqualified from benefits under OAR 471-030-0038(5)(b)(F) since regulatory provision refers to a "potential discharge," not a discharge for "potential misconduct" and, for disqualification, the record must show by a preponderance of the evidence that claimant engaged in actual misconduct). On the facts in this record, there is insufficient evidence to conclude that claimant resigned to avoid a discharge for actual misconduct. While the employer had apparently issued three reprimands to claimant while it was urging her to resign, those reprimands were for perceived inadequacies in her work performance and there was nothing about them from which the willful or wantonly negligent mental state needed to support claimant's misconduct can be reliably inferred. See OAR 471-030-0038(1)(c), OAR 471-030-0038(3)(a). Nor, on this record, is there sufficient evidence for us even to conclude that the employer wanted to discharge claimant for the behavior underlying these three warnings or for other behaviors that constituted actual misconduct. The ALJ's conclusion that claimant was precluded under OAR 471-030-0038(5)(b)(F) from showing good cause to resign from work was in error.

When a claimant resigns to avoid a discharge not for misconduct, claimant may show good cause for leaving work under OAR 471-030-0038(4)(a) if he or she shows that the discharge was reasonably certain and imminent under the circumstances. See *McDowell v. Employment*, 348 Or 605, 236 P2d 722 (2010); see also *Mark A. Sorenson* (Employment Appeals Board, 12-AB-2907, November 28, 2012) (claimant had good cause to leave work to avoid imminent, inevitable discharge, not for misconduct); *Susan L. West* (Employment Appeals Board, 12-AB-2961, November 16, 2012) (claimant had good cause to leave work to avoid an imminent and evitable discharge that was not for misconduct). While claimant did not know the exact day on which she was going to be discharged when she quit, the store manager repeatedly and consistently told her over a period of approximately seven months that the district manager had instructed him to fire her if she did not resign, he began telling her that he had no

other option if she did not resign, then in early November 2014, for the first time, gave claimant a timeline for her discharge if she did not resign by stating he was going to discharge her as soon as he "prepared the paperwork" or in a "day or two" or during the "first week in November." Given the escalation of the store manager's threats to discharge claimant and the specificity with which he stated his plans in early November 2014, claimant had ample and reasonable grounds to believe that she could not avoid a discharge if she did not resign and that the discharge date was very rapidly approaching. EAB has never required a claimant to demonstrate that a certain date for her discharge was settled on at the time she quit, if the circumstances establish that the discharge was inevitable and reasonably imminent, and all that remained was the determination of the precise discharge date. *See Karen J. Russell* (Employment Appeals Board, 2014-EAB-0941, July 22, 2014) (claimant had good cause to leave work to avoid a discharge not for misconduct when, although claimant could have remained working for an additional four to six weeks after she resigned, her discharge was inevitable); *Christina J. Wilcox* (Employment Appeals Board, 2014-EAB-0609, May 14, 2014) (claimant had good cause to leave work to avoid a discharge not for misconduct when, although the employer had not stated to claimant or her representative a date by which it intended to discharge her, it was reasonably inferred from the employer's statements that it was very soon going to discharge claimant if she had not resigned at the time that she did); *Kevin B. Gough* (Employment Appeals Board, 13-AB-0206, February 25, 2013) (claimant had good cause to leave work when he resigned at least two weeks before the date that he thought he was going to be discharged because a reasonable and prudent person would not have decided to remain at work "in favor of a *de minimus* amount of continued employment").

Aside from the objective circumstances indicating that claimant's discharge was reasonably inevitable and at hand when she resigned, claimant's belief was likely magnified by the job insecurities that her counselor identified as symptoms of her anxiety and depression and claimant's own observations that the employer had discharged two other long-term employees during the same time that the store manager was attempting to induce her to resign. Audio at ~37:38. Claimant's tearful demeanor during the hearing and the depth of her emotion when she recounted the details of her encounters with the store manager after March 2014 were further demonstration of the firmness of her belief that she was going to be discharged and the obvious distress with which she accepted that inevitable outcome. Audio at ~21:48, ~24:43, ~44:50. On the facts in this record, a reasonable and prudent very long-term employee, experiencing anxiety and depression which manifested itself as an overwhelming fear that she would lose her job, would have reasonably concluded that her discharge was certain and imminent and would have resigned when claimant did to avoid that discharge.

Claimant demonstrated good cause for leaving work when she did. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 14-UI-28476 is set aside, as outlined above.

Tony Corcoran and J. S. Cromwell;  
Susan Rossiter, not participating.

**DATE of Service:** January 20, 2015

**NOTE:** You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and

information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the website at [court.oregon.gov](http://court.oregon.gov). Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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